No. 12,722

IN THE

United States Court of Appeals

For the Ninth Circuit

California Motor Transport Co., Ltd. (a corporation), et al.,
Appellants,

vs.

The Fidelity and Casualty Company of New York (a corporation), and Bayly, Martin & Fay, Inc. of California (a corporation),
Appellees.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE BAYLY, MARTIN & FAY, INC. OF CALIFORNIA.

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STATEMENT OF THE CASE.

Plaintiff and appellee, The Fidelity & Casualty Company of New York (hereinafter called plaintiff) sued California Motor Transport Company and its associates, defendants and appellants (hereinafter called defendants) for premiums alleged to be due by

reason of the issuance by plaintiffs to defendants of certain public liability insurance policies.

Defendants, by proper order, brought Bayly, Martin & Fay, Inc. of California, third party defendant and appellee (hereinafter called third party defendant) into this proceeding alleging that Bayly, Martin & Fay had acted as the insurance broker in the matter, to wit, had acted as the agent for defendants in procuring the insurance for the latter and as agent of plaintiff for the purpose of collecting the premiums. The third party complaint is based on the theory that third party defendant received and accepted the insurance policies in question but failed or refused to advise its principal, the defendants, of the receipt thereof.

Upon conflicting evidence the trial Court found that the receipt of said policies of insurance and the contents thereof was duly and timely reported to defendants by third party defendant.

The area of conflict between the testimony and evidence of all of the parties was relatively narrow. Both plaintiff and defendants depended heavily upon testimony and evidence of third party defendant. Once the trial Court made the key finding that third party defendant had revealed to defendants the receipt of the policies, and had so revealed the effect in dollars of such policies, the case against the third party defendant collapsed.

An analysis of the four alleged causes of action against the third party defendant, a showing that

each collapses in face of the key finding made by the trial Court, and references to the transcript to show that an actual conflict in the evidence exists, constitute the basic showing of third party defendant in this brief. No attempt will, of course, be made here as was done in the trial Court, to show the inherent improbability of the testimony of defendants concerning the key conflict, but certain of the statements of defendants in their opening brief will be referred to for clarity.

ARGUMENT.

THE FACTS IN THE LIGHT OF THE SPECIFICATIONS OF ERROR.

Specifications 12 to 18, inclusive, are directed at alleged errors of the trial Court relating to the complaint of the defendants against the third party defendant. Each of these specifications complains either of the insufficiency of the evidence to support a finding or upon the failure of the Court to find certain things. Specifications of error of this type would appear to require a more detailed statement of facts than should be necessary in a brief before this Honorable Court. Such statement follows:

Bayly, Martin & Fay, third party defendant, had handled the public liability insurance problems of the defendants since 1941 under policies issued by plaintiff. At all times herein mentioned third party defendant acted through its vice president, Mr. Cantlen. Each year the policies would expire on September 1st,

and each year, prior to September 1st, Cantlen would negotiate with the company for the rate to be charged the succeeding year. Upon each renewal the terms of the insurance policy were identical with the previous year with the exception of the premium rate (Tr. pp. 300-318).

Prior to September 1, 1946, plaintiff demanded a higher premium rate from the defendants and also demanded a retrospective agreement under the terms of which the rate would be determined by the loss experience, but in no event would the rate be less than 1 per cent of the gross receipts or more than 3 per cent of the gross receipts with the current premium payable at 2 per cent of the gross receipts. It is this 2 per cent that brings about the $2.00 per $100 rate to which all of the parties herein refer (Tr. p. 321).

Plaintiff issued a binder under date of August 27, 1946 to cover the defendants during the negotiations for the new rate (Defendants' Exhibit B). Cantlen took this binder to the defendants on August 27th having with him various data necessary for the discussion with the defendants. At that time Cantlen explained the retrospective plan to Mr. Coughlin, acting for the defendants. At that meeting Cantlen drew up third party defendant's Exhibit NN, which cogently and forcefully proves that the $2.00 rate was discussed. Coughlin swore he had "never heard of the rate", but does not deny that Cantlen drew up Exhibit NN in his presence, and in fact admitted it (Tr. pp. 353-354).

Coughlin did not read the binder but turned it over to his employee Davis; Davis made no report on it to Coughlin; the binder on its face is for 60 days only, and on the reverse side of the binder it states "No risk shall be bound otherwise than on the company's official form", and that no risk shall be "bound by letter nor renewed by letter" (Defendants' Exhibit B); at the end of the 60 days, Coughlin did not ask for an extension of the binder. The 60 day period of the binder ended October 26th; on or about November 18th, after the 60 day period was ended, Davis, acting for defendants, received a copy of a letter from Cantlen to the American Manganese Steel Division in which it was plainly stated that defendants had insurance in effect until September, 1947; in fact, under date of November 5, 1947, Davis had written Cantlen asking that he, Cantlen, write the letter to American Manganese advising them of the expiration date, and asked Cantlen to send him a copy of same (Third Party Defendant's Exhibit PP); even before November 18, 1946, and during the 60-day period in question Coughlin received the proposed retrospective agreement (Defendants' Exhibit C), from Cantlen; Exhibit C contains a reference to the new policy SPL 20968 but Coughlin did not look at it, didn't read it and didn't ask anyone in his organization to read it; Coughlin knew a binder gives coverage only until a policy is issued (Tr. p. 347).

Pursuant to instructions from Coughlin, Cantlen went back to the plaintiff and sought an arrangement other than the $2.00 rate and the retrospective agree-

ment. Cantlen also scurried around looking for a market other than the plaintiff wherein he could place defendants' risk at a more advantageous rate (Tr. pp. 325-326).

On or about September 23, Cantlen was called to the Fidelity and Casualty Company office and delivered an ultimatum that the policies would have to issue on a retrospective plan basis (Tr. p. 326); shortly thereafter Cantlen received the policies SPL 20968 and SPL 20950, Plaintiff's Exhibits 3 and 4, and the proposed retrospective agreement, Defendants' Exhibit C; upon receipt of the policies Cantlen read them and knew that the rate was therein set up as a standard rate of $2.00 per $100 of gross earnings.

Immediately after receiving the policies and the retrospective agreement from the plaintiff Cantlen went to see Coughlin taking with him the proposed retrospective agreement but not taking the policies because Bayly, Martin & Fay did not consider the issuance of the policies a completed transaction because of the insistence of plaintiff that the retrospective agreement be signed; the policies were finally physically delivered to the defendants on or about October 27, 1947, at which time Cantlen was still arguing with the plaintiff that they should not charge the $2.00 standard rate (Plaintiff's Exhibit 18).

At this meeting immediately after receiving the policies and the retrospective agreement, Cantlen told Coughlin of the declaration (issuance) of the policies; he explained in detail how the retrospective agreement worked and what it would cost Coughlin, using de-

fendants' past gross revenues as a projection into the future; the retrospective agreement contained a reference to Policy SPL 20968 on its first page (Defendants' Exhibit C); at all times thereafter in correspondence with the plaintiff, the new Policy SPL 20968 was used by third party defendant. Coughlin himself testified substantially the same concerning this meeting (except as to being told about the issuance of the policies); he testified that Cantlen brought the retrospective agreement to his, Coughlin's, office but that he did not understand it; that Cantlen left the agreement on Coughlin's desk; that Coughlin did not observe the reference to Policy SPL 20968 that showed on the front page of the retrospective agreement. In addition to a previous statement in the record as to Cantlen's testimony concerning the fact that he told Coughlin of the issuance of the policies, Cantlen's testimony on page 272 of the transcript reads as follows:

Q. Are you sure that you even told Mr. Coughlin that any policies had been received by you from Fidelity?

A. Yes, I am quite sure.

Q. When did you tell him that?

A. At the time of delivering the retrospective agreement.

Q. Do you have any definite recollection of having told Mr. Coughlin at that time that policies had been received by you from Fidelity at the same time as they delivered to you the retrospective agreement?

A. I feel certain I did.

Q. Do you have any definite recollection of it?

Mr. Murman. It has been asked and answered, Mr. Eisner.

Mr. Eisner. He says, "I feel certain of it." I think that is a conclusion.

Q. Do you have any recollection of having made any such statement?

A. Yes, I think I did, Mr. Eisner.

Q. Did Mr. Coughlin tell you he would accept or approve the policy of the combined rate of $2.20, as compared with the rate of 1.223, which he had been paying?

A. No, he did not.

Coughlin's denial that Cantlen told him of the issuance of the policies reads as follows (Tr. p. 407):

Q. Did you ever agree to pay a rate of $2.20 per annum?

A. I should say not.

Q. Did you know that any policies had ever been written with a rate of $2.20 per annum prior to October 22nd, 1947?

A. No, sir, never heard of the rate.

In December, 1946, plaintiff demanded the signing of the retrospective agreement and upon not receiving the same canceled the insurance effective January 19, 1947. The final audit of the premiums as provided in the policy and in all previous policies was not made up until April of 1947. Upon receipt of this audit Cantlen learned that the plaintiff was demanding the $2.00 basic standard rate. From April until August, Cantlen argued with plaintiff seeking to have it reduce the rate. In August of 1947, Cantlen drafted a letter for defendants' signature (Plaintiff's Exhibit 18) but was unable to see Coughlin until October of 1947.

Coughlin signed the letter that was drafted by Cantlen.

Before passing on to a detailed consideration of the findings on these issues there is one further point which bears comment. Appellants in their argument place considerable stress on the fact that this appellee continued its negotiations with plaintiff concerning the premium rate and the proposed retrospective agreement during the entire time that the coverage in controversy was in effect. From this fact appellant contends for the conclusion that such coverage was in its entirety an extension of the former policy at the former rate. This fact rather points to this appellee, as broker and agent for appellants, at all times carrying out its responsibilities and acting for the best interests of its principal. Mr. Cantlen tried in every possible manner to get a better deal for his client. The fact that the policies had been issued did not stop him from trying to place the risk elsewhere and from trying to have plaintiff revise or reduce the premium rate in question. If he had been successful in placing the risk in another company on more favorable terms the policies issued by plaintiff could have been canceled. If he had been successful in having plaintiff change the premium rate the new policies could have been re-written. It is submitted that the appellants' contention on this phase of the case points up the consistent picture of this appellee working untiringly and in utmost good faith to serve the interests of appellants. Whether the policies in question, that had been issued in fact, were or were

not "issued" as a matter of law is to be decided between plaintiff and defendants, and does not affect third party defendant.

ANALYSIS OF THE FOUR CAUSES OF ACTION ALLEGED BY DEFENDANTS AGAINST THIRD PARTY DEFENDANT.

The only material conflict between the witnesses for defendants and those for the third party defendant, and the only possible issues between said parties, are the questions (1) whether or not Cantlen advised Coughlin that the binder covered the defendants pending *all* negotiations for new insurance, and (2) whether or not Cantlen advised Coughlin of the issuance by plaintiff of the two insurance policies at or about the time of issue.

First cause of action.

The first cause of action is based on the theory that third party defendant represented to defendants that the binder would cover defendants pending the negotiations for the renewal of the insurance, at the old premium rate at 1.223 per cent of the gross receipts; that said representations were made to induce defendants to continue to pay said rate (sic); that such representations were false and untrue and were so known to be by third party defendant.

Cantlen testified that at the time he delivered the binder to Coughlin he explained the retrospective plan and told Coughlin the binder would be his, Coughlin's, coverage pending renewal. A letter of transmittal from Cantlen to Coughlin on the binder states the

same thing (Defendant's Exhibit I). Coughlin testified that Cantlen, when he delivered the binder, told him it was to be in effect at the old rate during the negotiation. It is significant in this connection that the binder on its face had a blank for the insertion of estimated premium but that this had not been filled in by plaintiff.

The various findings of the Court have resolved this conflict between the testimony of Cantlen and the testimony of Coughlin in favor of Cantlen. The binder carried on its face a statement that it, the binder, would be superseded by the issuance of policies. On or about October 1st, the policies were issued and given to Cantlen. Cantlen immediately carried out his duty and notified Coughlin of the issuance of the policies.

Whatever the legal effect as between plaintiff and defendants of the issuance of the policies, it is clear that there is ample evidence for the findings of the Court absolving the third party defendant of any liability under the first cause of action.

Second cause of action.

The second cause of action is the same as the first except in place of alleging the representations were false, it alleges the third party defendant had no reasonable grounds for believing such representations to be true because the third party defendant had received the two policies in question.

As we have stated, there was a conflict as to what was said and done when the binder was delivered,

concerning the coverage of the binder. This conflict was resolved in favor of third party defendant by the trial Court. Further, there was a sharp clash of testimony as to whether or not Cantlen told Coughlin of the issuance of the policies. This also was resolved in favor of third party defendant by the trial Court.

The second cause of action falls with the findings above noted, both of which were made on conflicting evidence.

Third and fourth causes of action.

The third cause of action is based on the theory that third party defendant "concealed from and failed to notify defendants" of the issuance of and receipt by third party defendant of the two policies SPL 20968 and SPL 20950.

The fourth cause of action is based on an allegation that third party defendant "carelessly and negligently failed and omitted to notify" defendants of the issuance and receipt of said policies.

The issue is really very narrow. That issue has been decided against the defendants and appellants by the trial Court on conflicting evidence.

THE CONTENTIONS IN APPELLANTS' OPENING BRIEF.

With the foregoing highlights on the limited issues between defendants and third party defendant in mind, we are logically led into a consideration of the specific arguments set forth in defendants' opening brief concerning them. In their brief defendants

start their discussion of these issues on page 53, referring generally to the "wrongful and unauthorized action by Bayly, Martin & Fay." It should be noted in passing that we do not agree with appellants' statement that third party defendant's lack of authority to accept the insurance policies is an admitted or uncontradicted fact. To the contrary, the answer of this third party defendant alleges that defendants were advised that the policies would be issued, that the premium rate would be based upon $2.20 per $100.00 of gross receipts, and that defendants should sign the proposed retrospective agreement. The answer further alleges that third party defendant received the policies on or about October 1, 1946, and that the receipt thereof and the contents thereof were duly reported to defendants. The trial Court on conflicting evidence found all of these allegations to be true, so that it may hardly be contended that lack of third party defendant's authority to accept the policies is uncontradicted or admitted. The record in its entirety presents a consistent picture in which this third party defendant, as broker, accepted and carried out not only the authority but the responsibility of keeping defendants adequately and fully covered with liability insurance not only to protect defendants from loss but to effect compliance with the applicable state and federal statutes governing motor transport carriers.

We necessarily return again to the matter of the issuance of the binder which was delivered to, and accepted by, Mr. Coughlin on behalf of the defend-

ants. The binder speaks for itself (Defendants' Exhibit B). Mr. Coughlin knew that plaintiff would not renew the coverage under the expired premium rate, and he knew, or should have known, that the binder on its face left open the amount of the premium. In this connection it may be well to quote the language in 29 *Am. Jur.* 159 on binders as follows:

> "Binding slips may be, and ordinarily are, informal instruments. It is not essential that they express all the elements of the contract, such as the rate of premium, or even, it has been held, the name of the insurer. The essential elements of the contract may be implied. *It is sufficient as to the rate, for example, that the binder shows by necessary implication an agreement to pay whatever rate may be fixed.*" (Emphasis added).

See:

Law v. Northern Assurance Co., 165 Cal. 394, 132 Pac. 590.

Coughlin also knew that the binder was only effective for a period of 60 days and he was never advised that the binder was extended, nor did he ask to have it extended (Tr. p. 348) so that when the binder period expired and he still had coverage it is obvious that he knew the policies had been issued and were in effect. The clear factual picture leaves no room for a contention that third party defendant was guilty of any breach of duty in this regard. Again in this portion of their opening brief defendants rely heavily on the fact that third party defendant was continuing its negotiations with plaintiff concerning

a premium rate adjustment. As we have previously pointed out herein, such conduct on the part of third party defendant was entirely consistent with the fact that the policies had been issued.

UNDER THE CIRCUMSTANCES THE RETENTION OF THE POLICIES BY THIS APPELLEE WAS NOT A BREACH OF DUTY.

Mr. Cantlen testified that he advised Mr. Coughlin that the policies in question had been issued (Tr. p. 272). It goes without saying that if there had been any desire to conceal the fact Mr. Cantlen would not have sent Mr. Coughlin a copy of the letter to American Manganese (Third Party Defendant's Exhibit PP) which stated unqualifiedly that the coverage was in effect for the full policy year. The very plausible reason that the policies were held by third party defendant was, as stated by Mr. Cantlen:

> "A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed, so, therefore, in our opinion the transaction wasn't completed." (Tr. p. 273.)

While it had been the practice of third party defendant in prior years to deliver the policy or policies to defendants when issued, there was in this particular instance an entirely different situation presented, first, by reason of plaintiff's request for the signing of the retrospective agreement, and secondly, by this third party defendant continuing endeavors to negotiate a more favorable contract for its principal,

which efforts were on the direct instructions of defendants (Tr. p. 325).

Defendants contend that the retention of the policies by third party defendant and the failure to deliver same to defendants was the direct cause of the liability for the premiums being imposed on defendants. Without again detailing the documentary evidence and the testimony in the record as to the knowledge of defendants that there was insurance in force, suffice it to say once more that this contention of defendants could only be sustained on the completely implausible theory that Mr. Coughlin, with long experience in insurance matters as they relate to the trucking business, and with complete awareness of the peril faced by his operations in the absence of necessary coverage as required by law, could blissfully choose to ignore all of the facts and circumstances to the contrary and rely on a parol or implied extension of a binder, which stated on its face that it would expire 60 days from its date and could not be extended except by a new binder (Defendants' Exhibit B).

BAYLY, MARTIN & FAY NOT GUILTY OF CONCEALMENT.

With regard to the defendants' contention that third party defendant was guilty of concealment it would appear advisable to refer to the various conflicts in the evidence considered by the trial Court with respect to the testimony of Mr. Cantlen for third party defendant and Mr. Coughlin for defendants. It is alleged in the answer of third party

defendant that the proposed retrospective agreement was delivered to defendants, that the binder (which on its face left open the amount of premium charge) was delivered to defendants, that defendants knew that it was necessary for third party defendant to negotiate for a new premium rate and that plaintiff was demanding a higher rate, that third party defendant reported to defendants on the receipt of the policies and as to the contents thereof, and that defendants knew how, and in what manner, the proposed retrospective agreement would affect the new $2.20 rate. The trial Court found all of these allegations to be true and the question is necessarily presented as to whether there is evidence to support such findings. In this connection, of course, findings of fact should not be set aside on appeal unless clearly erroneous or plainly wrong, and due regard must be given to the opportunity of the trial Court to judge of the credibility of the witnesses (Rule 52, *Rules of Civil Procedure, Blackner v. McDermott,* 176 Fed. (2d) 498).

It is interesting to note in passing, on this question of credibility of witnesses, that defendants in their opening brief rely heavily on Cantlen's testimony as supporting their contentions against plaintiff, but Cantlen's testimony is suddenly dismissed with a wave of the hand when defendants treat with the narrow issues between them and third party defendant.

Mr. Coughlin admitted that he was shown the retrospective agreement and that Mr. Cantlen ex-

plained it to him in detail and left the agreement with him, and that the binder in question was delivered to and left with him. With regard to the binder Mr. Coughlin testified (Tr. p. 403) that Mr. Cantlen told him that plaintiff would go along at the old rate pending further negotiations. To the contrary, Mr. Cantlen testified that when he delivered the binder to Mr. Coughlin, he stated that premium rate negotiations were still in progress and that the binder was issued pending renewal. (Tr. pp. 239-240.) This testimony is entirely consistent with Cantlen's letter of transmittal (Defendants' Exhibit I) and the trial Court resolved this conflict against defendants. As to the fact of the issuance of the policies in question, Mr. Coughlin testified (Tr. p. 405) that Mr. Cantlen did not tell him the policies had been received, but Mr. Cantlen testified that at the time he delivered and explained the provisions of the retrospective agreement to Mr. Coughlin he told him that the policies had been issued (Tr. p. 272). The trial Court again resolved this conflict against defendants. The fact that Mr. Cantlen shortly thereafter sent defendants a copy of his letter to American Manganese previously referred to (Third Party Defendant's Exhibit PP), stating unequivocally that the essential policy was in effect for the full policy year, necessarily lends further support to the trial Court's finding.

Defendants make a further point of the fact that third party defendant did not immediately notify defendants of a premium demand which third party defendant received on April 19, 1947. What defendants

overlook is that this was the first notice to third party defendant that plaintiff was definitely claiming payment at the $2.20 rate (Tr. p. 275). Following receipt of this demand Mr. Cantlen for third party defendant engaged in discussions with plaintiff as to the validity of this claim, disputed the right of plaintiff to collect the same (Tr. pp. 276-277), and finally assisted in the drafting of a letter to plaintiff over the signature of defendants, which letter is plaintiff's exhibit 18, declining payment of the invoices (Tr. pp. 278-279). How or in what manner this conduct on the part of third party defendant could in any manner injure appellants is not explained by them in their brief.

A further contention under the general charge of concealment is that this appellee collected premium payments from appellants and failed to promptly remit same to the plaintiff. In the absence of any contention that these payments were not properly credited it appears obvious that even assuming for purposes of argument that there was a delay in transmission, no prejudice resulted to defendants. In fact, however, the evidence shows that the alleged delay in transmitting the payments on to plaintiff is standard practice (Tr. 286).

Appellants then contend that this appellee informed appellants that the binder would constitute its coverage "pending renewal". Such is the usual and general purpose of a binder and was the situation here, so the information given was correct. As to the time limit of the binder, it spoke for itself, and the policies superseded the binder.

In their contentions on this matter of concealment, appellants are apparently attempting to advance some theory, on which they do not expound, that they would have acted differently on disclosure and so would not have been liable for the premiums. On the above considerations we submit that there was full disclosure, and that the trial Court properly so found, but even assuming that some particular fact had not been disclosed, appellants still suffered no damage thereby. The record does not disclose that defendants could have placed the risk elsewhere at the expired premium rate (Tr. pp. 356-365) and further, as to most of the alleged concealments, they could not have taken place until after the policies were finally cancelled and so are necessarily beyond the issues of this case in any event.

The last point raised by defendants in this portion of their brief concerns the fact that third party defendant received monthly reports and remittances of premiums from appellants on the basis of the old premium rate without protest or objection. Wherein could such action constitute a breach of duty on the part of third party defendant? The record shows that all of these reports and remittances were transmitted by third party defendant to plaintiff before third party defendant first became aware that plaintiff was claiming payment of the higher rate, and rate negotiations still were in progress during all of this time.

THE OPINION OF THE TRIAL COURT.

The final portion of defendants' opening brief deals with the portion of the Memorandum Opinion bearing upon the liability of third party defendant.

Defendants first make the point that, contrary to the expression of the trial Court, Coughlin was entitled to believe that the binder would cover the risk for some undetermined length of time and could rely on his agent to get extensions. Defendants here overlook the fact that the trial Court found on conflicting evidence that Coughlin knew the policies had been issued. Not only Cantlen's testimony but the correspondence constituting third party defendant's exhibit PP sustain this finding. The large bold type on the binder itself, delivered to and left with Coughlin, which states that the binder is effective for 60 days, cannot be ignored. At the time the binder was issued it was issued to cover the risk pending renewal, in accordance with good insurance practices, and there was no misrepresentation by the agent on this subject.

The observations above also dispense with defendants' contention concerning the trial Court's statement that the defendants knew, or should have known, of the delivery of the policies to third party defendant. Under the findings, Coughlin knew the policies had been issued. Cantlen told him not only orally but in writing. Coughlin knew the binder was for 60 days only, he never inquired, nor was he advised, that the binder was extended, and he knew he was still covered by insurance after the 60 days expired. He also received a copy of a letter from Cantlen stating that the

coverage was for the full policy year. What more could be necessary to support the opinion of the trial Court?

As to the copy of the letter in question (Third Party Defendant's Exhibit PP) defendants excuse themselves on the contention that copies of such letters when received were simply filed as a matter of course. In this connection it is interesting to note the exact contents of the three letters comprising this exhibit. The letter of the American Manganese Steel Division requests of defendants *specific information concerning the expiration date of the current coverage.* Davis acting for Coughlin and the defendants, sends this letter on to Cantlen with the request that he answer the letter direct, *giving them the information requested,* and allowing defendants a copy of the letter. Davis, familiar with the binder, makes this request of Cantlen, concerning expiration date of the coverage, on November 5, 1946, *after the binder had by its terms expired.* Cantlen makes reply under date of November 18, 1946, stating that the coverage expires September 1, 1947, which is the end of the full policy year. Yet defendants now contend this entire exchange was only a "clue" which they were not obliged to notice.

CONCLUSIONS.

It is again noted in conclusion that third party defendant is involved in this litigation only upon a relatively narrow issue of fact, separate and apart from

the basic controversy between plaintiff and defendants. Whatever may be the final determination of that basic controversy, this third party defendant submits that the factual issues as to its actions and conduct in the premises have been properly resolved in its favor by the trial Court on more than sufficient evidence, that such findings must be sustained, and that the judgment in favor of third party defendant should be affirmed.

Dated, San Francisco, California,
February 28, 1951.

Respectfully submitted,
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